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No. 78-1846

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,

Petitioners,

vs.

JOHN PATTERSON, et al., WILLIAM P. CORKILL, et al., JAMES P. CHAPMAN, EDWARD T. JOYCE, MARTHA JENKINS, JAMES A. BRANDVIK, LOWELL H. JACOBSON, CRAIG E. ANDERSON, ROBERT E. CRONIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners named in the caption pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit for review of orders which reversed the decisions and judgments of the United States District Court for the Northern District of Illinois, Eastern Division and remanded them to the trial court on January 24, 1979 (Exhibit A) A petition for rehearing of the orders

of the Court of Appeals in causes Nos. 77-1930, 77-1931, 77-1932, 77-2263, 77-2264 and 78-1029 was denied on March 2, 1979. (Exhibit B)

Petitioners further pray that a Writ of Certiorari or in the alternative a common law Writ of Certiorari issue to review the jurisdiction of the Court of Appeals in the review of the proceedings in the trial court which was decided January 8, 1976 and is reported as *Patterson* v. *Stovall*, 582 F.2d 180 [CA 7th, 1976] (Exhibit C) as well as the orders issued in the criminal appeal of *U. S.* v. *Stovall*, No. 77-2048 which it appears is a mere extension of the opinion in *Patterson* v. *Stovall*.

OPINIONS BELOW

The order and decision of the District Court issued on July 12 dismissed the complaints of *Fry, et al.* v. *Stovall, et al.*, 73 C 2748 for lack of diversity jurisdiction (all plaintiffs were Illinois residents as were defendants) and *Keppy, et al.* v. *Stovall, et al.*, 73 C 2385 for lack of diversity jurisdiction and failure to state a cause of action. The order of July 12, 1976 also ordered the remaining three individual class suits consolidated. (Exhibit D). The objections of the *Fry* plaintiffs to the settlement agreement were overruled and the Settlement Agreement approved. (Exhibit E)

The final order approving the Revised Settlement Agreement was issued by the District Court on February 20, 1975 and it overruled the objections filed by the Fry objectors after their dismissal and authorized a distribution from Fund "A". (Exhibit F). An appeal notice was filed on March 19, 1975 by the Fry objectors.

After the Court of Appeals affirmed the Revised Settlement Agreement in January of 1976, fee petitions were filed by the Committee attorneys for the class members, the defendants' attorneys and the attorneys for the objectors.

The Court approved fees for the Committee attorneys pursuant to its equitable jurisdiction to award fees to the prevailing party in a class action. The petition for the then attorneys for the defendants resulted in an order allowing fees in the amount of $205,000.00 which had been paid in cash by the defendants in September 1973 and July of 1973. The court denied fees for hours claimed for work in the criminal proceedings based on the District Courts reading of the provisions of the Settlement Agreement for the payment of fees of defendants' attorneys. The defendants attorneys objected to the hourly rate the Court allowed them ($60.00) and the denial of fees for work in the criminal case, and appealed the orders of the District Court. The objectors' attorneys Joyce and Chapman petitioned for fees for work after February 20, 1975 as did Martha Jenkins who filed her appearance for Objectors on May 27, 1976. Attorneys Joyce and Chapman appealed from the denial of their petitions for services after February 24, 1975 and also from the hourly rate at which they have been paid for services prior to February 20, 1975. Ms. Jenkins appealed from the order denying her petition for fees for services after May 27, 1976.

The defendants were dissatisfied with the representation they received from Jacobson and Brandvik and on May 1, 1975 they hired Robert Cronin to replace them. Cronin sought to become a co-counsel with Jacobson and Brandvik, and on June 30, 1975 he was discharged by defendants. The District Court denied his fee petition because Cronin accomplished nothing of consequence in the litigation during his brief employment. Robert Cronin filed an appeal from the denial of his petition for fees.

The orders denying the payment for further fees to the former attorneys for the defendants, and attorneys for the objectors were entered in *Patterson et al.*, v. *Stovall, et al.*,

(consolidated cases 73 C 2280, 73 C 2382 and 73 C 2720) and are represented in the Court of Appeals as appeal nos. 77-1930, 77-1931, 77-1932, 77-2263 and 77-2264.

On April 18, 1975 the Objector's attorneys petitioned to intervene in the criminal prosecution of the defendants, *United States* v. *Stovall, et al.*, (73 Cr 679) but the Judge denied their petition. Thereafter the petitioners continued to appear in the criminal proceedings as volunteer prosecutors with the tacit permission of the Court. The objectors on October 11, 1977 the day before the imposing of sentence on the defendants filed a petition for fees with the criminal court in the amount of $158,308.00. The judge in the criminal proceedings while acknowledging that the services of the Objectors' attorneys had been helpful found that he was without jurisdiction to grant fees for their work in the criminal proceedings. He said he would recommend payment of fees to the defendants' former attorneys and to the attorneys for the objectors, and he hopped off the bench to do so, but was unable to locate the judge of civil proceedings. The Objectors' attorneys filed a civil appeal from the order of the criminal court denying their fee petitions. This appeal is found as Appeal No. 78-1029 in the caption of the appeals from the district Court in nos. 77-1930, et seq.

JURISDICTION

The question of whether the District Court had jurisdiction over the consolidated class suits troubled Judge McMillen, but he found that the District Court had jurisdiction over the class suits pursuant to §§ 4 and 6(b) of the Commodity Exchange Act, 7 U.S.C., or that the Court could have jurisdiction under the statutory interpleader section (1335) of 28 U.S.C. Still the District Court in its decision of July 12, 1974 admonished the parties before it that "the question of federal jurisdiction is not free from

doubt . . . ." The Court also noted that even though the Defendants did not contest the Court's jurisdiction, the parties could not confer jurisdiction on a federal court by agreement. (Exhibit D, pp. 4, 5).

The Court of Appeals, *sua sponte*, considered the question of whether it had jurisdiction and found that it believed that one or more alternate grounds for federal jurisdiction did exist. The Court of Appeals stated in a footnote discussion of its jurisdiction:

> On appeal none of the parties have argued that this Court does not now have jurisdiction. However the question was seriously raised in the trial court before defendants withdrew their motion to dismiss. Despite that withdrawal the District Court would have no authority to approve the settlement had it lacked jurisdiction. (Exhibit D, footnote #5)

The question of whether there was jurisdiction in the district court to approve the Settlement Agreement, or in the Court of Appeals to review the proceedings in the trial court is open to a sua sponte consideration by the Supreme Court. The objective of the Petitioners herein is as follows: They seek a review of the jurisdiction of the Court of Appeals in rendering the opinion in *Patterson* v. *Stovall* to ascertain whether the Court had jurisdiction over the appeal when all the appellants had settled their controversy with the defendants and released them from any claims in the proceedings on appeal. They also seek a determination of whether the Court of Appeals, if it had jurisdiction to hear the appeal performed the non-judicial function of making an advisory opinion when it formulated an opinion concerning a sentence to be imposed in a criminal case not on appeal, and whether the Court of Appeals exceeded its jurisdiction when it used the sentence imposed

after a nolo contendere plea to nullify provisions of the settlement agreement in the civil appeal before it. The petitioners further seek a review of the proceedings in the two appeals, one civil and the other criminal decided by the Court of Appeals on January 24, to determine whether the exercise of the excess power and performance of non judicial functions in *Patterson* v. *Stovall* affected the jurisdiction of the Court of Appeals in issuing the orders.

The jurisdiction of the Supreme Court to exercise its jurisdiction to review the judgments by Writ of Certiorari is found in 28 U.S.C. 1254 (1) [62 Stat. 928]. In the event the application of petitioners is denied they seek the extraordinary common law Writ of Certiorari to review the issues raised in their petition. Since all issued in the petition relate to lack of jurisdiction or excessive exercise of its jurisdiction by the Court of Appeals, jurisdiction for the common law Writ of Certiorari would be found in 28 U.S.C. §1651.

QUESTIONS PRESENTED

I. Whether the Court of Appeals exceeded its jurisdiction when it found that the Appellants had standing to pursue the appeals before the Court in the face of a settlement of the claims of the Appellants on or before the date the Notice of Appeal was filed.

II. Whether the Court of Appeals exceeded its jurisdiction when it rendered an opinion on the effect of a settlement agreement in the civil case before it on the sentence to be imposed by a judgment in a criminal case.

III. Whether the Court of Appeals ~~exercised~~ exceeded its jurisdiction when it mandated the Trial Court to exercise its equitable jurisdiction to award fees to objectors' attorneys.

STATEMENT OF THE CASE

The appeal in *Patterson* v. *Stovall* came to the Court of Appeals on the appeal of 6 persons called the Fry Objectors who were represented by attorneys James Chapman and Edward T. Joyce. The appellants sought reversal of the approval of a settlement agreement entered into by the plaintiffs in the consolidated class suit and the defendants.

The proceedings in the appeal began with the filing of 5 individual class actions, which were:

1. *John Patterson et al.*, v. *Roy Stovall, et al.*, (73 C 2280) filed 9-5-74 by Attorney Jeffrey Schulman
2. *Dobson et al.* v. *Stovall, et al.*, (73 C 2382) filed 9-14-73 by Attorney Herbert I. Rothbart
3. *Keppy et al.*, v. *Stovall et al.*, (73 C. 2385) filed 9-14-73 by Attorney Philip S. Wolin
4. *Brackett* v. *Stovall, et al.*, (73 C 2720) filed 9-24-73 by Attorney Michael Zelman
5. *Fry et al.* v. *Stovall, et al.*, (73 C 2748) filed by Attorney James P. Chapman

A sixth suit was referred to Judge Thomas R. McMillen for hearing because it involved the same defendants, but this suit

6. *Churchill* v. *Stovall, et al.*, (73 C 2468) filed by Attorney Paul E. Plunkett

was not a class action suit. Mr. Plunkett negotiated a fee arrangement with his clients and held letters of representation from each. The Court was not called upon to approve the settlement agreement which called for a return of 82.78% of the deposit of each of the plaintiffs and a 15% fee from this amount.

On October 23, 1973 the attorneys for Stovall and American filed two motions to dismiss the five complaints. The first motion was addressed to the complaints of *Patterson, Dobson, Keppy* and *Brackett*. A separate motion was filed to dismiss *Fry*.

On November 3, 1973 the Patterson attorneys filed a motion to consolidate the 5 suits but the court declined to do so and the cases continued as related cases, only.

On January 8, 1974 a pre-trial conference was held to investigate the possibility of a settlement and by February 20, 1974 a tentative agreement outlined.

On February 25, 1974 the Fry objectors filed their objections to the settlement agreement. A second pre-trial conference was held to try to resolve the objections of the Fry objectors but it was unsuccessful.

On April 11, 1974 the defendants' attorneys withdrew their motion to dismiss the complaints of *Patterson, Dobson, Keppy* and *Brackett,* but continued their motion to dismiss the *Fry* complaint.

On July 12, 1974 the court ruled on the motion to dismiss the *Fry* complaint and dismissed for want of federal diversity jurisdiction because all the plaintiffs and the defendants were Illinois residents. The Court also dismissed *Keppy* v. *Stovall* for lack of federal jurisdiction and failure to state a cause of action. In the same order the Court ordered the three remaining class suits consolidated. Motion to approve the settlement agreement allowed and the objections of the Fry objectors overruled.

Following the dismissal of the *Keppy* complaint, Attorneys Wolin and Mintz filed a motion to add them as additional parties plaintiffs and for leave to file their appearances and on August 5, 1974 the Court granted them leave.

Following the suggestion of the Court in the hearing on the motions and order issued July 12, 1974, the attorneys, Schulman, Rothbart and Zelmar formed a Committee for the representation of the entire class. Attorneys Wolin and Mintz joined the Committee.

On September 12, 1974, Harry Fins and Harold Harris joined the Committee after leave was granted to file their petition for the 28 persons who had originally sued in the Circuit Court of Cook County. Mr. Edward Berman joined the committee at the invitation of attorney Schulman and others.

Following the dismissal of the Fry Complaint, Joyce and Chapman chose a different route from that of Wolin and Mintz. Attorneys for the *Fry* plaintiffs continued to appear in Court and to object to the terms of the Revised Settlement agreement filed July 27, 1974. This action of the *Fry* attorneys created the anomalous situation in which the *Fry* plaintiffs who had all signed claims and filed releases which released the defendants from further liability were represented by the Committee for purposes of participating in the settlement awards, and represented by Chapman and Joyce who continued to press objections to the settlement agreement.

One of the provisions of the settlement agreement was that any claimant who wished to do so, could opt-out of the settlement and pursue his claim for 100% of his deposit by submitting a form so indicating. The settlement agreement provided that the claims of opt-outs were to be paid from Fund B which was in the amount of one million dollars. (See Revised Settlement Agreement, Exhibit E for terms of settlement. Dates changed on notice and copies sent to claimants in February 1975)

Pursuant to this provision Chapman and Joyce filed their appearance as attorneys for Joe Cisel, Donald Prince,

Paul E. Johnson and Wanda Webber, as members of Fund B. This appearance was filed 9-24-74 but the four claimants submitted forms to be participants in the settlement agreement in March 1975 and the Committee Attorneys thereafter represented them. Joyce and Chapman took no action on behalf of the four persons just mentioned, but continued to press objections on behalf of the *Fry* compla. ıants. Following this appearance, Joyce and Chapman began an intensive discovery program in an effort to discover additional assets for the fund, but they were unsuccessful and found no assets not already reported in the J.K. Lasser, Certified Public Accountant's report.

January 21, 1975 the Committee attorneys filed a proposed final order and on January 23, 1975 the objectors were granted leave to file their objections to the final order. On February 6, 1975 leave was requested to present the settlement agreement to the class plaintiffs.

On February 20, 1975 the Court approved the settlement and granted leave to send notices to the class plaintiffs. The objections of the Fry objectors were overruled. On March 19, 1975 the objectors filed their notice of appeal.

The Court of appeals considered the briefs and argument of the parties and issued an opinion on January 8, 1976. In its opinion the Court of Appeals stated that "the sole question on appeal is whether the trial judge abused his discretion in approving the settlement. We affirm the trial court approval of the settlement." (Exhibit C).

In its opinion the Court of Appeals found conflict in the language of the settlement agreement and resolved the conflict by reviewing the powers of the criminal court to impose restitution as a part of a sentence of probation. The court stated that the language of the agreement (and presumably the release given by the class members) could not be read to usurp the criminal court's power to order restitution.

The language of the opinion by the Court of Appeals in its review of *Patterson* v. *Stovall* was construed by Judge Marovitz (the criminal judge) and Judge McMillen (the civil judge) as transferring the custody of the res of Fund B to Judge Marovitz for distribution. The objectors' attorneys and the defendants' former attorneys interpreted the language of the opinion to mean that Judge Marovitz had authority to grant attorneys fees to those who had participated as volunteers in the criminal proceedings and to the defendants' attorneys.

The criminal court judge was convinced that he did not have jurisdiction to grant attorney fees to any attorneys not appointed by the court, and in his final order in *U.S.* v. *Stovall et. al.*, 73 Cr 679 he transferred "his jurisdiction" over Fund B to the civil court for distribution under his order to the civil court judge that attorneys' fees be paid and the remainder distributed as restitution to the members of the class as "aggrieved persons" under the restitution statute.

On November 13, 1975 the defendants entered into an agreement with the opt-out claimants whereby they would settle their claims under the same terms as the members of the settlement agreement and give the defendant the same type of releases. On December 17, 1975 the trial court granted approval of the settlement and ordered payment from Fund B. (Exhibit H)

The case at this time should have been settled. Every person who had a claim against the defendant had settled that claim either through their individual suits as the Plunkett claimants, by the settlement agreement with payment from Fund A, or by individual agreement with opt-outs. Each and every individual had signed a separate and individual release of the defendants for all claims and more particularly for their claims under the suits filed in the District Court.

The suit should have ended with a distribution of the balance of the funds and payment of Internal Revenue Claims, if any. Instead by the action of the Court of Appeals, in finding the settlement agreement provisions nullified by the power of the criminal court to impose restitution, and that the Court had jurisdiction even though the appellants had settled their controversy with the plaintiffs, litigation began anew. The objectors attorneys, all of whose clients had settled their claims under Settlement agreement began discovery, actions in the criminal court, challenged ownership of Fund B so that a Magistrate was appointed to determine ownership. The magistrate found that the opinion of the Appellate Court on January 8, 1976 nullified not only the provision of the settlement agreement allowing the defendants to have any excess of the fund after the payments specified in the agreement but also nullified the provision of the settlement agreement calling for payment of the claims of the Internal Revenue Service.

Review is now sought by the Petitioners by Writ of Certiorari because they have no other remedy for an abuse of the jurisdiction of the Court of Appeals. The petitioners think the Court of Appeals had no jurisdiction to hear an appeal in which all claims and controversies in the court below had been resolved and ended. The petitioners further believe that the Supreme Court should review the strange manner in which the jurisdiction of the Court of Appeals for the Seventh Circuit is exercised in reaching down into a trial court to review issues not on appeal before it and issuing an opinion as to the powers of a criminal court and in support of such powers nullifying the provisions of a civil agreement before the court on appeal. And last, the petitioners believe that the Court of Appeals has no jurisdiction to mandate the trial court to grant fees to attorneys who on final analysis were representing no clients in the controversy because these clients settled their difference with the defendants under the settlement agreement.

ARGUMENT

I.

THE COURT OF APPEALS EXCEEDED ITS JURISDICTION WHEN IT FOUND THAT THE APPELLANTS HAD STANDING TO PURSUE THE APPEAL BEFORE THE COURT IN THE FACE OF A RELEASE OF THE CLAIMS OF THE APPELLANTS ON OR BEFORE THE DATE THE NOTICE OF APPEAL WAS FILED.

The Petitioners herein contend that a Writ of Certiorari should issue to review the question of whether the Court of Appeals had jurisdiction when it heard argument and rendered an opinion in an appeal in which all of the appellants had entered into a settlement agreement with the defendants under which they specifically ". . . . release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth. . ." ". . . in connection with . . . any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720."

A perusal of the releases signed by the six appellants indicates that they were executed on the dates shown in the following tabulation.

William P. and Jean B. Corkill	Release signed 3-18-75
Philip Corkill (erroneously denominated John Corkill in the caption of appeal)	Release signed 3-15-75
Joanna C. Duda	Release signed 3-18-75
James Fry	Release signed 3-12-75
Diane L. Jezierski	Release signed 3-19-75
Robert Ryan	Release signed 3-18-75

The Notice of appeal was filed on March 19, 1975 and from the information shown above it appears that the attorneys were seeking an appeal at the approximate same time as the individual appellants were seeking to participate in the settlement agreement and signing forms to release defendants in the suit on which appeal was being sought. There clearly was a lack of communication between the clients and attorneys.

It is axiomatic that a Court of Appeals lacks jurisdiction to hear a moot or theoretical case (United States Constitution, Article III, Section 2; *Askwander* v. *T.V.A.*, 297 U.S. 288, 80 L. ed. 799, 56 S.Ct. 466).

In the face of the objections of the appellees that the six appellants lacked standing to appeal, the Court of Appeals had a duty to ascertain whether or not it had jurisdiction to hear the case. The Court of Appeals disregarded this duty when it disposed of the objections of the appellees in the manner indicated in footnote #1 of its opinion. Here the Court says:

> . . . Initially appellees maintained that the objectors had no standing to bring this appeal. In the light of the total factual picture, however, there is no doubt that the objectors have standing to appeal. The fact that they accepted certain funds in settlement did not constitute a waiver since that action was taken primarily to help the plaintiff-appellees secure a disbursement from the bank."

The Court of Appeals cannot base its jurisdiction on anything so tenuous as the explanation of the appellants attorneys that the appellants only entered into a settlement of their claims against the defendants because they desired to help plaintiff-appellees secure a disbursement from a bank. Absent a more compelling argument by the attorneys that the releases were invalid because obtained by

fraud, duress or the like, it is clear that the releases signed and submitted by the appellants on different dates were intended to and did constitute a complete settlement of the controversy between the plaintiff-appellants and the defendant-appellees. (Copies of the signed releases are found as Exhibit G)

II.

THE COURT OF APPEALS EXCEEDED ITS JURISDICTION WHEN IT RENDERED AN OPINION ON THE EFFECT OF A SETTLEMENT AGREEMENT IN THE CIVIL CASE BEFORE IT ON THE SENTENCE TO BE IMPOSED BY A JUDGE IN A CRIMINAL CASE.

The appeal in the case of *Patterson* v. *Stovall* came to the Court of Appeals on the sole issue of whether the District Court had exceeded its discretion in approving the compromise and settlement agreement, and the question is whether in making its review of that question, the Court of Appeals exceeded its jurisdiction on the facts shown below.

The function of a court of appeals after it has determined that it has jurisdiction over the appeal is to make a review of the proceedings in the trial court to determine whether the trial court properly applied the law to the facts as they were presented to the trial court.

Using this basic and simple definition of the function of a court of appeals, it is clear that if the District Court pursuant to the federal rules of evidence (Evidence Rule 803 (23)) could not consider the nolo contendere pleas and conviction thereunder, then the Court of Appeals could not use the nolo contendere plea and conviction thereunder in reviewing the actions of the trial court.

Perhaps, an even more obvious exercise of excessive jurisdiction by the Court of Appeals can be seen in the

action of that Court in raising *sua sponte*, or in response to the argument of appellants the question of whether the judge in the criminal case involving the same acts as formed the basis of the civil appeal before them had jurisdiction to impose restitution as a condition of probation, and what effect the provisions of the settlement agreement would have on powers of the criminal judge.

The proceedings in the criminal case were not before the court and the question of whether or not the powers of the criminal court to impose restitution as part of the condition of probation was unrelated to the single issue before the court in the civil appeal.

While Courts of Appeal have wide latitude in the discussion of facts necessary to make a decision as to whether the trial court below correctly applied the law to the facts of the case, the latitude does not include jurisdiction to reach down into the proceedings of a case not on appeal before the court and review the proceedings therein. It is the duty of a court of appeals to decide actual controversies and not give opinions on moot questions or abstract propositions of law, and it should not declare principles or rules which cannot affect the matter in issue before the court in the case on appeal. (*Whiting* v. *Dick*, (1906) 202 U.S. 132, 59 L. ed. 129, 35 S.Ct. 16; *Flexwood Co.* v. *Matt G. Faussner & Co.* (CCA, Ill. 1944) 145 F.2d 528; *John Kennedy Radio Corp.* v. *Chicago Bears Football Club*, (CCA, Ill. 1938) 97 F.2d 233).

In the present case, it is clear that the Court of Appeals intended to review the proceedings in the criminal trial court and to render an (advisory) opinion on the question of the criminal court's power to impose restitution on the defendants. As the Court of Appeal states in *U.S.* v. *Stovall, et al.*, 77-2048:

> "In Patterson v. Stovall, 528 F.2d 108 (7th.Cir. 1976) this court affirmed Judge McMillens approval of a settlement agreement that had been drafted by the parties in the class action against Stovall and American Cash Commodities. In reaching this result, we construed the agreement to permit the trial judge in the criminal proceedings to order restitution to the depositors as a condition of the defendants' probation."

The question is whether a court of Appeals has jurisdiction to review the power of a criminal court judge to impose restitution in a criminal case which is not before the court on appeal.

III.

THE COURT OF APPEALS EXCEEDED ITS JURISDICTION WHEN IT MANDATED THE TRIAL COURT TO EXERCISE ITS EQUITABLE JURISDICTION TO AWARD FEES TO ATTORNEYS FOR OBJECTOR.

The equitable jurisdiction of a federal court to award fees to attorneys for services is limited by the American rule that disfavors awarding costs to the successful party in a civil suit (*States* v. *Ringgold*, 8 Pet. 150, 8 L. ed. 899 (1834)).

Federal district courts make an exception to the American rule only when the overriding interests of justice require the Courts to exercise their equitable powers to grant attorneys fees (*Hall* v. *Cole*, 142 U.S. 1, 93 S.Ct. 1943, 36 L. ed. 2d 702 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 24 L. ed. 593, 90 S.Ct. 616 (1970)).

The equitable powers of the federal district court may be used to award fees in instances where there would be an unjust enrichment in instances in which the plaintiff had benefitted a group who would then share a common fund (*Trustees* v. *Greenough*, 105 U.S. 527, 532, 26 L. ed. 1157 (1882)).

The common fund theory has been consistently approved by federal district courts in situations in which the actions of named plaintiffs "benefit the entire group so that to allow the other members of the class to benefit without contribution to the expense of litigation would constitute unjust enrichment. (*Mills* v. *Electric Auto-Lite Co., supra*)

In the case on appeal the Court of Appeals exceeded its jurisdiction when it improperly applied the unjust enrichment theory to a criminal proceeding in which the plaintiff is the United States government.

The Objectors attorneys sought to intervene in the criminal proceedings before Judge Marovitz, but their motion for leave to do so was denied. Thereafter their participation in the criminal proceedings was as volunteers.

Their claim for fees was for services for preserving the million dollars in Fund B for restitution from the claims of the Internal Revenue Service. The Government attorneys objected to the payment of fees by the Criminal Court, but did not intrude on the proceedings in the civil court. The Government's position which was made known by the United States Attorney's office admitted that the volunteers had been helpful to the government in conference and in supplying information about what was transpiring in the civil suit, but that their efforts did not preserve the funds in Fund B. The claim of these attorneys for fees raises the question of whether fees should be paid to volunteers for preserving a fund already in the custody of the District Court from the claims of the United States Government. The equitable powers of the district court should not be mandated by the Court of Appeals for such services.

But perhaps even more important is the fact that after the "objectors" individually settled their controversy with the defendants by their individual action in claiming their pro rata shares of the funds in Fund A and signing

releases of the defendants' claims, and more particularly the claims in *Patterson* v. *Stovall* as consolidated, the objectors' attorneys no longer represented them. Since the client has exclusive control over the subject matter of a suit, the clients had a right at any time to compromise and settle their controversy with the defendants, and this is true even if the clients promised the attorneys they would not settle. (*Kendall* v. *U. S.*, 7 Wall U.S. 113, 19 L.ed. 85). Further the attorneys Chapman and Joyce after their appearance was entered for the so called claimants Cisel, Webber, Johnson and Prince "as claimants against Fund B" lost their right to represent these claimants when they signed releases and voluntarily sought to participate in the settlement agreement. They too settled their controversy with the defendants.

CONCLUSION

The facts revealed in the Petition for Writ of Certiorari submitted by the Petitioners herein reveal that the Court of Appeals undertook an appeal over which it had no jurisdiction because it failed to properly investigate whether or not it had jurisdiction to hear the appeal of a case in which the issues were rendered moot by the individual settlement and release of the defendants by the six appellants.

Further, in reviewing the single question in the civil appeal, the Court of Appeals used an excess of jurisdiction by reaching into a criminal case in the district court and raised the issue of whether the judge in the criminal case had power to impose restitution as a condition of probation. Having decided the issue from the criminal suit, the Court of Appeals then applied the nolo contendere pleas and conviction of the defendants to the settlement agreement to nullify some of its provisions. This strange use of the jurisdiction of the Court of Appeals and its opinion as a

result thereof, allowed the attorneys representing the appellants to continue litigation over the Fund allocated to the defendants under the settlement agreement for another two years. The litigation of the non-existent controversy between the appellants and the defendants created by the opinion of the Court of Appeals then resulted in fee petitions from the appellants attorneys who by that time had no clients to represent for work done in a court in which they were volunteers. On appeal of this issue the Court of Appeals reversed the decision of the trial court and mandated the payment of fees under the equitable jurisdiction of a federal district court. Clearly the intervention of the Supreme Court is necessary to give the Petitioners a remedy for the wrongs imposed upon them by the opinion opinion issued by the Court of Appeals dehors its jurisdiction.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 24, 1979

(ARGUED JUNE 8, 1978)
Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

JOHN PATTERSON, et al.,

Plaintiffs-Appellees,

Nos. 77-1930, 77-1931, vs.

77-1932, 77-2263, 77-2264 and 78-1029
ROY STOVALL, et al.,

Defendants-Appellees,

WILLIAM P. CORKILL, JOHN CORKILL, JOANE DUDA, JAMES FRY, DIANA JEZIERSKI, ROBERT RYAN,

Objectors-Appellants,

JAMES P. CHAPMAN, EDWARD T. JOYCE and MARTHA M. JENKINS,

Appellants,

JAMES A. BRANDVIK, LOWELL H. JACOBSON and CRAIG E. ANDERSON,

Appellants,

ROBERT E. CRONIN,

Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 73 C 2280, 73 C 2382, 73 C 2720
Thomas R. McMillen, Judge.

ORDER

These consolidated appeals are taken from a series of orders entered by the district court denying the plaintiff-appellees' applications for an award of attorneys' fees in the wake of civil and criminal proceedings against the defendants Roy Stovall and American Cash Commodities of Missouri, Inc.

The defendants were indicted in September, 1973, on twenty-five counts of mail fraud and two counts of perjury. In that same month, a number of class action suits were filed in a federal district court seeking an accounting of funds and a rescission of all contracts between the plaintiff-depositors and the defendants Stovall and American Cash Commodities.

Shortly after the defendants pleaded *nolo contendere* to the criminal charges in February, 1974, a proposed class action settlement agreement was presented to the district court in the consolidated civil case. By the terms of the agreement, the defendants' funds on deposit at the Continental Illinois National Bank were divided into two groups: Settlement Fund A, consisting of six million five hundred thousand dollars, was established for the benefit of the depositors' claims; and Settlement Fund B, consisting of one million dollars, was established for the payment of certain debts and obligations of the defendants. The district court approved the proposed settlement agreement, and on appeal this court affirmed. *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976).

On December 20, 1976, the plaintiff-appellees Jacobson and Brandvik filed a fee petition with the district court which was predicated on paragraph 3(c) of the revised Settlement Agreement:

> "All money in Settlement Fund 'B' shall be set aside and held, subject to further order of Court, and shall be held subject to the disposition of such litigation as may ensue on behalf of 'OP OUT' claimants or others, including *defendants' attorneys' fees and costs.* It shall also be subject to claims of the Internal Revenue Service. After payment or denial by Court Order of all those claims, and the expiration of thirty (30) days thereafter, all that is remaining, if any, shall belong to 'AMERICAN', but in no event shall this occur less than one (1) year after approval of this settlement by the District Court unless extended by Court Order" (emphasis added).

In ruling on the petition, however, the trial judge declared that he did "not read paragraph 3(c) of the revised Settlement Agreement to specifically subject Fund B to any of the defendants' fees and expenses in the criminal case." He therefore awarded fees to Jacobson and Brandvik for work done in the civil case only, and at an hourly rate substantially less than that awarded class counsel.

From our review of the record, we are left with a firm conviction that the court below committed a clear error of judgment in reaching this conclusion, for it appears that the parties to the Settlement Agreement contemplated that the trial judge would award fees from Fund B to the defendants' attorneys for services rendered in both the civil and criminal cases. Indeed, in a "Petition to Revise and Amend," Jacobson and Brandvik supplied supporting letters and affidavits to this effect from attorneys for the plaintiff class, the plaintiff-objectors and the United States Government. We must therefore conclude that Jacobson and Brandvik are entitled to compensation from Fund B for all of the hours spent in both the civil and criminal cases, and at an hourly rate consistent with that paid other counsel of similar background and experience.

While the claims of Jacobson and Brandvik are grounded on paragraph 3(c) of the Settlement Agreement, those of the plaintiff-objectors Chapman, Joyce and Jenkins are based on the principle that an attorney should be compensated for services that confer a benefit on the plaintiff class. In this connection the trial court awarded fees of $17,110 to the plaintiff-objectors' attorneys for services rendered in the civil litigation prior to February 20, 1975. The objectors claim on appeal, however, that they are entitled to fees for work performed after February 20, in preserving and enhancing Fund B for the plaintiff class.

On the record before us, we must agree. The objectors appealed from the district court's approval of the Settlement Agreement on the grounds that the language of the Agreement would foreclose any restitution to the plaintiff class from monies in Fund B. While this Court affirmed the district court's ruling, it made clear that the Agreement could be construed to allow payment from Fund B to class members in the form of restitution. *Patterson* v. *Stovall*, 528 F.2d 108, 111 (7th Cir. 1976). And this, indeed, is precisely how the Agreement was subsequently construed by the district court.

Similarly, the Objectors contributed to the preservation of Fund B from the competing claims of the Internal Revenue Service. In particular, they repeatedly urged the district court that the despositors' claims to Fund B were superior to those of Stovall and thus superior to those of the IRS. More important, perhaps, they played a significant role in urging this same position on the United States Attorney, whose recommendation was largely responsible for the IRS decision to withdraw the claim.

In these ways, then, the Objectors' counsel sharpened and clarified important issues for a final resolution that furthered the interests of the plaintiff class. We must therefore conclude that they are entitled to compensation for services performed after February 20, 1975 in prosecuting the appeal and in protecting Fund B from the claims of the IRS.* We express no view on the appropriate rate of compensation other than to note the Objectors' counsel should obviously not be compensated at the same rate as counsel.

Finally, as to the plaintiff-appellee Robert Cronin, the district court found that Cronin was "not entitled to any compensation in the civil litigation" since "nothing of consequence" was accomplished by his services on behalf of the defendants. It is clear from the record, however, that Cronin was engaged by Stovall to represent him in the civil proceedings, and that he did serve in this capacity from May 1, 1975 to June 30, 1975. We must therefore conclude that he, too, is entitled to some compensation from Fund B for whatever time he expended on the civil matter during this period. We again express no views on the appropriate rate of compensation.

Thus, for the reasons noted above, the judgment of the district court is reversed, and the cause remanded for further proceedings consistent with the views expressed in this opinion.

REVERSED and REMANDED.

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* We note in this connection that we find no grounds for holding that the district court abused its discretion in awarding fees at a rate of $40 per hour for the services performed by the Objectors' counsel prior to February 20, 1975.

EXHIBIT B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 2, 1979

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

JOHN PATTERSON, et al.,

Plaintiffs-Appellees,

Nos. 77-1930, 77-1931 vs.

77-1932, 77-2263, 77-2264 and 78-1029
ROY STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,

Defendants-Appellees.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellees Roy Stovall and American Cash Commodities of Missouri, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

In the

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1349

JOHN PATTERSON, RAYMOND KEPPY and JEANNETTE KEPPY, individually and as representatives of a class,

Plaintiffs-Appellees,

v.

ROY STOVALL, STOVALL & STOVALL, AMERICAN CASH COMMODITIES OF MISSOURI, INC., FRANK L. HACKBARTH, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY, McKERR & COMPANY, and CHICAGO BOARD OF TRADE,

Defendants-Appellees,

WILLIAM P. CORKILL, JOHN CORKILL, JOANE DUDA, JAMES FRY, DIANE JEZIERSKI and ROBERT RYAN,

Objectors-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 73 C 2280, 73 C 2382 and 73 C 2720
THOMAS R. McMILLEN, *Judge.*

ARGUED OCTOBER 29, 1975—DECIDED JANUARY 8, 1976

Before HASTINGS, *Senior Circuit Judge*, SPRECHER and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* This appeal is brought by certain named individuals on behalf of themselves and other in-

dividuals similarly situated raising objections to a class action settlement. The sole question on appeal is whether the trial judge abused his discretion in approving the settlement. We affirm the trial court's approval of the settlement.

Appellants-objectors[1] are members of a class of plaintiffs who over a two-year period deposited money ultimately totalling approximately $9,700,000 with Rawlin L. Stovall and his company, American Cash Commodities of Missouri, Inc., both defendants herein, for investment by them in cash commodities for deferred delivery. In September, 1973, immediately prior to the defendants' indictment on charges arising out of their misuse of these funds, numerous suits were filed seeking class status, an accounting of the depositors' funds, and a recession of all contracts between the depositors and the defendants.

Shortly after the criminal indictments were returned against both defendants, plaintiffs requested the court to enjoin the transfer of $6,500,000 on deposit in the defendants' bank accounts. Although no injunction order was entered, the money remained on deposit at the Continental Bank. On February 6, 1974, a proposed settlement was presented to the trial court and counsel for both

[1] William P. Corkill, John Corkill, Joane Duda, James Fry, Diane Jezierski and Robert Ryan are the six appellant-objectors who equal in number .0018 percent (6 of 3,183 + 18), or approximately 1/5 of 1 percent of all depositors, having claims totalling $19,925.00 or .0022 percent of all claims. In fact, they represent approximately 1/5 of 1 percent in number and in amounts of all claims. Although in terms of the class and settlement their number and size might be considered miniscule, the serious issues raised before this Court are not reduced in their magnitude. Initially appellees maintained that the objectors had no standing to bring this appeal. In light of the total factual picture, however, there is no doubt that the objectors have standing to appeal. The fact that they accepted certain funds in settlement did not constitute a waiver since that action was taken primarily to help the plaintiff-appellees secure a disbursement from the bank.

sides requested leave to present the settlement to the class members.

Appellants, through independent counsel, filed numerous objections both to the substance of the settlement and to the procedures followed in preparing the settlement proposal for submission to the court. With one exception, appellants' objections and suggestions were overruled; the class was certified, the proposed settlement was approved for submission to the class, and notice of the class certification and the proposed settlement was sent to the class. Appellants filed objections to the form of the notice and again asserted their objections to the proposed settlement itself. On February 20, 1975, the trial court overruled all objections, approved the settlement, and authorized a distribution of part of the sequestered funds to the class.[2]

[2] The settlement agreement provided as follows:

"The defendants Stovall, American and Hackbarth, have submitted a Settlement Agreement for approval to the Court. The Agreement provides, in substance, that $6,500,000 (now approximately $6,800,000) (Fund 'A') will be set aside and deposited in interest bearing accounts for eventual distribution to those class members on a pro rata basis who establish their claims and to counsel for plaintiffs for their fees and expenses, as determined by the Court, in full and final settlement of all claims against Stovall, American and Hackbarth, which are alleged in the Complaints or could have been alleged by reason of or in connection with any matter or fact set forth or referred to in any of the Complaints.

'Settlement Fund A' shall consist of all the aforesaid funds and all interest accruing thereon, less $1,000,000 allocated to 'Settlement Fund B'. Upon its establishment by court order, 'Settlement Fund A' shall be available to all plaintiff-depositors who shall participate in this settlement by filing acceptable claims for refund (which shall be limited to the amount of monies deposited, exclusive of interest, profits and other increments) with the

(footnote continued)

It appears that the major stimulus for the defendants' civil settlement of the actions against Stovall was the government's agreement to accept a plea of *nolo contendere* to all counts in the indictment, except for one perjury count, to which Stovall pled guilty. Judge Marovitz received the pleas and sentenced Stovall to two concurrent five year sentences, which were immediately suspended in favor of probation under 18 U.S.C. § 3651. Judge Marovitz was fully informed of the terms of the civil settlements. On February 28, 1974, at the time of defendant's sentencing, the judge announced that the disposition of the defendants, admittedly quite lenient under all the facts and circumstances, was based in part on his intention of ordering further restitution out of settlement monies in fund "B" (discussed *infra* pp. 11-12) pursuant to the court's power under the restitution statutes. This point was again restated by the court on September 20, 1974. Nevertheless, the language of the settlement

(footnote continued)

Court, and for claimants who do not file, but may be equally entitled to a refund. 'Settlement Fund A' shall be used for the pro rata distribution of all such claims, subject only to actual costs of administrating said funds which are necessarily incurred by consolidated class counsel, costs in mailing distribution after notice, and reasonable costs and attorneys' fees to consolidated class counsel.

The approximate sum of $1,000,000 (Fund 'B') will be set aside in interest bearing accounts and subject to claims of any creditors who are not depositors, the claims of depositors who choose to litigate their claims, claims of the Internal Revenue Service and of any creditors who are not depositors, defendants' attorneys' fees and costs of any fines imposed against defendants in the criminal proceedings before Judge Abraham L. Marovitz. In the event any funds remain in Fund 'B' after payment of all claims herein described the balance shall be turned over to American."

agreement reached by the parties states that any money remaining in fund "B" will be turned over to Stovall's company. Depositors who were reimbursed out of Fund "A" are barred from claiming or receiving further amounts from fund "B". Thus Judge Marovitz' intention to order further restitution appears to conflict with the language of the settlement agreement.

We believe that this apparent conflict must be interpreted in favor of the depositors. Since Judge Marovitz' handling of the criminal proceedings greatly influenced the settlement of the civil cases we do not believe that the wording of the agreement should be read to usurp his power to order restitution[3]—an action which he clearly indicated he would take on two separate occasions. If in the future, he should decide that as a condition of probation defendants must make restitution by paying out of money left over in fund "B" in the criminal case such an order would not violate the settlement agreement reached in the civil suit. Thus the most compelling argument of objectors that Stovall still remains a millionaire, despite his nefarious activities in defrauding depositors, his criminal conviction, and the multiple lawsuits filed against him, is not really valid since Judge Marovitz still retains the power to order restitution to depositors from any funds remaining with Stovall or his company in fund "B".

[3] Under 18 U.S.C. §3651 the sentencing judge clearly has the power to make restitution a condition of probation. Section 3651 states, inter alia:

"[W]hile on probation and among the conditions thereof, the defendant may be required to pay a fine in one or several sums; and may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . ."

As the Court of Appeals we have no power to rewrite a settlement agreement reached by the parties. However, we do have the authority to approve or disapprove a class action settlement after considering any objections raised. Our approval in this case is based upon our interpretation of the agreement entered into after the parties were made aware of Judge Marovitz' intentions.[4]

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[4] The transcript of proceedings on February 28, 1974 before Judge Marovitz indicates that attorneys involved in the civil suit were present for the defendants' sentencing and that the following colloquy took place:

"By Mr. Montana (prosecutor):

"Through various discussions with our office, it is my understanding that our office has agreed that in the unique situation of this case, because of the availability of the money, that we would not oppose and in fact would suggest to the Court that probation be imposed under the strictest condition and that is that this Court maintain power and jurisdiction over those settlement funds; that as complete restitution as possible be made to the victims for the monies that Mr. Stovall fraudulently took from them; that the Court is sure that the defendant does not profit substantially from this fraud. . . [Tr. 4].

By Mr. Branvik (attorney for defendant):

Your Honor, I have explained to Mr. Stovall, following our discussion that this Court will maintain jurisdiction to review the terms of the settlement and also particularly the contents of Fund B under the settlement at the end of the civil litigation and that this Court will determine, will have the power to determine at such time, whether a fine or other conditions should be imposed with respect to that Fund B settlement as to Mr. Stovall and he understands it, your Honor.

The Court: Does he consent to it?

Branvik: Yes, your Honor.

The Court: Is that correct, Mr. Stovall?

The Defendant: Yes, sir, it is [Tr. 6].

* * *

(footnote continued)

Our approval is also based upon the principle that an appellate court will only intervene and upset a settlement upon a clear showing that the trial court committed an abuse of its discretion. *State of West Virginia* v. *Chas. Pfizer & Company,* 440 F. 2d 1079, 1085 (2d Cir. 1971); *Newman* v. *Stein,* 464 F. 2d 689, 692 (2d Cir. 1972); *United Founders Life Insurance* v. *Consumers Nat'l Life Insurance,* 447 F. 2d 647 655 (7th Cir. 1971). Courts of review generally will consider the facts of a settlement in a light favorable to promoting settlements. As the Court of Appeals for the Fifth Circuit stated in *Florida Trailer and Equipment Co.* v. *Deal,* 284 F.2d 567 (1960):

> "Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the applica-

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(footnote continued)

By the Court:

Well, this Court will impose a sentence on each count of five years and suspend the sentence, and also by agreement of the defendant in his own proper person and through his counsel suspend the imposition of a fine on each of these counts until September 20th or any other earlier or later date within the period of the probation depending upon the determination of the civil case which will establish the amount of money left in the B fund.

It is the Court's intention then to order restitution and impose such fines as the Court deems just under the circumstances."

tion for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and thus no basis for a compromise."

In light of this standard we shall review each of the major objections to the settlement raised by this appeal.

Appellant-objectors submit that the proponents of the settlement agreement did not create a sufficient factual record to permit the trial court to make a proper determination that the agreement was fair, reasonable and adequate. Specifically they argue that they were denied sufficient discovery before the settlement which would have enabled them to evaluate Stovall's claims for commissions, the potential costs of a trial, and the probability of multiple appeals. In addition they question the defendants withdrawing their motion to dismiss for want of jurisdiction. Since the question of jurisdiction can never be waived by the parties we have reviewed the record *sua sponte* on this issue and believe that one or more alternate grounds for federal jurisdiction does exist.[5]

[5] On appeal none of the parties have argued that this Court does not now have jurisdiction. However the question was seriously raised in the trial court before defendants withdrew their motion to dismiss. Despite that withdrawal the District Court would have no authority to approve the settlement had it lacked jurisdiction. However, we believe jurisdiction was available on a number of different theories. First, Judge Marovitz clearly had jurisdiction of the criminal suit and he conditioned his sentence in that case on the return of the depositors' funds. Thus even if the civil suits were without jurisdiction he could approve the settlement as a condition of probation. Second, although class members cannot aggregate their claims in a diversity case, *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), at least some of the claimants could have individually satisfied the $10,000 limitation. Third, jurisdiction might exist under either the Commodities Exchange Act §§4 and 6(b) or the Securities Exchange Act. Fourth, even if the case was dismissed on jurisdictional grounds the bank

(footnote continued)

Obviously an evidentiary hearing is not required before the settlement of every case. Under Rule 23 the trial court must be more vigilant over class settlements because of the rights of the absent class members and because sometimes counsel may appear to be too eager to settle in order to guarantee themselves a fee for their professional services. However a review of the settlement agreement here indicates that its genesis was on January 14, 1974 when Stovall's counsel were engaged in plea bargaining with the government. The class determination was not made until July 12, 1974, and all the parties were given until October 3, 1974, to determine whether the agreement was to be approved or to present their objections. At the October 3rd hearing appellant-objectors requested additional discovery and the court granted additional time to pursue discovery. They were allowed to depose Stovall, Hackbarth, the accountant, and any bank or financial institution they chose.[6] Unfortunately, this

(footnote continued)
could clearly re-file the same case with the same parties under the statutory interpleader section, 28 U.S.C. §1335, which requires only minimal jurisdiction of claimants. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 530-1 (1967); *Haynes* v. *Felder*, 239 F.2d 686 (5th Cir. 1957). Cf. *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971).

[6] Appellant-objectors claim that their discovery was limited in that they were not allowed to question the defendant about his potential liability. They requested the court to direct Stovall to answer the questions. The court refused to order the defendant to answer. We believe it was within the ambit of the trial court's discretion to refuse to order the answers. Since settlement negotiations had neared fruition with the vast majority of class members the court may have decided that the only inquiry that was proper dealt with the extent of Stovall's assets. In addition, Stovall may have had a privilege under the Fifth Amendment not to answer the questions. Normally, however, we would consider it an abuse of the court's discretion not to order a defendant to answer questions concerning his acts and possible liability in a civil case.

additional discovery did not produce any new information that would materially affect the settlement. Subsequently the court received various reports from the objectors and other parties in the action and entered an order on February 20, 1975 giving final approval to the settlement. There is no evidence of the trial court abusing its discretion. The court was most patient in allowing the appellant-objectors to pursue whatever discovery or investigations they desired over a period of eighteen months. Thus objector-appellants misplace reliance on *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942) where the court summarily dismissed the objectors' petition to intervene and denied them the right to produce evidence.

The objectors' main argument is similar to that pursued by *Greenspun* v. *Bogan*, 492 F.2d 375 (1st Cir. 1974), where the trial court had approved a derivative action settlement. Certain parties appealed claiming that the District Court abused its discretion because it failed to conduct an independent evaluation of the settlement and because it received more supporting data after giving its tentative approval. In considering this issue, the Court stated at p. 378 of the opinion:

> "Appellants contend that the District Court could not have exercised independent judgment because it lacked sufficient evidence to show the fairness of the proposed settlement. They point to the fact that the Court had access to only two depositions concerning the proposed fee schedules, both of which were conducted after the March 19th announcement that an agreement had been reached 'in principle' between the parties of the derivative action. Moreover, two volumes of exhibits and documents were given to the Court on the eve before it approved the settlement, giving rise to the speculation that the Court did not have a full opportunity to review their contents. And appellants point, most particularly, to the

> fact that the Court did not have any documents in its possession which could show that the proposed fee schedule was comparable to the fee schedules of other similar real estate investment trusts and their advisors.
>
> While the District Court's evaluation of the proposed settlement may not have been as comprehensive or intensive as it could have been, appellants have failed to show that the District Court clearly abused its discretion in approving the settlement because it lacked sufficient evidence upon which an independent appraisal could be based" (492 F.2d at 378).

In the instant case the trial court had sufficient facts before it to make an informed judgment. Perhaps holding an evidentiary hearing may be the better practice; the failure to do so however does not constitute a per se abuse of discretion. The court had ample opportunity to gain familiarity with the subleties of the proposed settlement. Memoranda in support of the settlement as well as objections were presented to the court. Further, the court had access to numerous documents, exhibits, a computer print-out of depositors and amounts invested, a transcript of the proceedings in the criminal case, a summary of the government's evidence, and, the benefit of dozens of appearances by counsel for the plaintiffs and defendants.

In reviewing a proposed settlement the court should consider the judgment of counsel and the presence of good faith bargaining. *Newman* v. *Stein, supra* p. 5. Courts usually refuse to substitute their business judgment for that of counsel, absent fraud or overreaching. As stated in *Zerkle* v. *Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151 at 159 (S.D.N.Y.) 1971).

> "The Court will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so

> unfair on its face as to preclude judicial approval.' *Glicken* v. *Bradford,* 35 F.R.D. 144, 151 (S.D.N.Y. 1964) . . . ."

The trial judge should not attempt to decide the merits of the controversy where the parties have reached a settlement. Any virtue which may reside in a compromise is based upon doing away with the effect of such a decision. *Woods & Selick, Inc.* v. *Todd,* 282 U.S. 881 (1930); *Schlieff* v. *Chesapeake & Ohio Ry. Co.,* 43 F.R.D. 175, 178-179 (S.D.N.Y. 1967); *City of Detroit* v. *Grinnel Corp.,* 495 F.2d 448 (2d Cir. 1974); "Factors Considered in Determining the Fairness of a Settlement." 68 *N.U.L.Rev.,* p. 1145. As Judge Wyatt stated in *Shieff, supra:*

> "In determining whether to approve the compromise or not, the Court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that" (43 F.R.D. at 178).

Appellant-objectors are asking this Court to upset a settlement which returns 80 to 90% of the original investment of the class members plus allows plaintiffs an option to pursue a 100% recovery. This settlement compared to much of the litigation in the federal courts is imminent fair and reasonable.

The creation of funds "A" and "B" is the result of negotiations between plaintiffs and defendants. It is a division of Stovall's assets accumulated from the scheme and acquired during the period described in the complaint. The trial court did not create the divided funds. The parties chose it as a method to provide defendants an incentive to settle.

Fund "A" consisted of approximately 6.8 million dollars set aside and deposited in interest bearing accounts for pro rata distribution to class members who agreed to the settlement. The majority of the money in fund "A" has already been paid out to depositors.

Fund "B" consists of one million dollars set aside to provide for those depositors who opt out of the settlement agreement of fund "A", claims by the Internal Revenue Service for taxes, claims by any creditors who are not depositors, and, any costs, fines or restitution payments resulting from the criminal proceedings before Judge Marovitz. Claims on fund "B" by depositors amount to approximately $48,000. The Internal Revenue Service has subpoenaed the records of defendants but no claims have been made at this time. Judge Marovitz has not yet ordered any restitution of monies from this fund as a condition of probation because not all of the money in fund "A" has been distributed nor have any of the other potential claims on fund "B" been made.

Appellant-objectors submit that the trial court had no basis for establishing the fund "B"; that the claims of the Internal Revenue Service cannot possibly amount to one million dollars, consequently Stovall and his company, American, stand to profit handsomely from the settlement. As we stated previously, Judge Marovitz still has the power to order restitution from fund "B". As to the potentially large claims of the Internal Revenue Service we issue no opinion at this time. Nevertheless it is difficult to believe that Stovall stands to make a profit because of wrongdoing.

Assuming *arguendo* that the defendants were to come out of the settlement with money remaining in fund "B" (a decision that largely rests within Judge Marovitz' discretion), that fact alone would not make the settlement unreasonable. A settlement by its very nature is an agreement where both sides gain as well as lose something. It is clear that by settling Stovall was able to maintain his freedom. But he also gave up a potentially large claim for "handling fees", he gave up his seat on

the Chicago Board of Trade, as well as his constitutional right to a jury trial and the raising of any legitimate defenses. In addition he has to serve a period of five years of probation during which he will not be allowed to trade on behalf of anyone other than himself.

Finally appellant-objectors contend that the court improperly relied upon the J. K. Lasser Company reports which gave an accounting of the Stovall assets. They submit the reports are without integrity because their author, Mr. Adelman, did not express an opinion, as is the usual practice by accountants; and, the fact that the reports did not constitute a full and complete audit of accounts, liabilities, and assets. Appellant-objectors advised the trial court of numerous deficiencies in the report and requested the appointment of an independent expert to evaluate the defendants' financial status. That request was denied after both plaintiffs and defendants attempted to explain the discrepancies in the Lasser Co. reports.

In response to this argument appellees now point out that the accuracy of the reports has been verified by the settlement itself. As of June 24, 1975, a total of 3143 claims were either filed, approved, or paid. This was out of an original 3369 depositors. Subsequent verification showed that many persons had three or four accounts and that the true number of located individual depositors came to 3143. These class members have all verified that their accounts were correctly reflected in the defendants' records which were the materials upon which the Lasser reports were based.

Moreover, the total claims amount to $8,755,546 as of this date, with only a few claimants to be located. This figure is very close to the estimated deposit figure of $8,900,000 used in the settlement and the J. K. Lasser

Co. computation. $6,063,274.50 has been paid to class members whose names and addresses and amount of deposits were taken from the Hackbarth computer printout and the J. K. Lasser reports. Even though the Lasser reports initially may have been questionable, their accuracy has been borne out of the disbursement of the settlement funds. No error was committed in relying on the reports in approving the settlement.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT D

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable THOMAS R. MCMILLEN, *Judge Presiding*
July 12, 1974

Cause No.
73 C 2280, 73 C 2382, 73 C 2385, 73 C 2468,
73 C 2720 and 73 C 2748

PATTERSON, etc. vs. STOVALL, et al., and related cases

JUDGE'S MEMORANDUM

Enter decision and ordered that 1) Defendant's motion to dismiss the complaint in *Fry, et al.* v. *Stovall, et al.*, 73 C 2748 is granted. 2) The objections of Fry to the proposed settlement are overruled except as to paragraph 5 thereof. 3) The motion of plaintiffs in *Patterson* v. *Stovall*, 73 C 2280 for class determination is granted in the form set forth above, and their motion to consolidate is granted, except for *Fry* v. *Stovall* and *Keppy* v. *Stovall*, 73 C 2835 which are dismissed, and *Churchill* v. *Stovall*, 73 C 2468 which is not a class action. 4) Defendants' motion to approve settlement agreement is granted with the exception noted above. Counsel for defendants are directed to prepare and serve a modified settlement proposal and a modified class notice within 10 days hereof, and all of these cases will be called for a status report on Friday, July 26, 1974 at 10 A.M. (DRAFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
NO. 73 C 2280

JOHN PATTERSON, etc.,

Plaintiff,

vs.

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2382

RICHARD DOBSON, et al.,

Plaintiffs,

vs.

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2385

RAY KEPPY and JEANNETTE KEPPY, etc.,

Plaintiffs,

vs.

RAWLIN L. STOVALL, et al.,

Defendants.

NO. 73 C 2468

FRED CHURCHILL, et al.,

Plaintiffs,

vs.

RAWLIN L. STOVALL, et al.,

Defendants.

NO. 73 C 2720

R. GLENN BRACKETT, etc.,

Plaintiff,

vs.

RAWLIN L. STOVALL, et al.,

Defendants.

NO. 73 C 2748

JAMES FRY, et al.,

Plaintiffs,

vs.

RAWLIN L. STOVALL, et al.,

Defendants.

DECISION

Several matters are pending in the above cases which are now ripe for decision. The first is defendants' motion to dismiss the complaint of *Fry* v. *Stovall, et al.*, 73 C 2748. Although this is the last of the six cases to be filed, it is the only one contested by the defendants and is fully briefed. Fry's attorneys have also objected to the proposed settlement which has been tentatively agreed to between counsel for all other parties.

We find and conclude that the defendant's motion to dismiss the *Fry* complaint is well-founded. Count I of that complaint is based on common law fraud and Count II on alleged violations of Secs. 12 and 17(a) of the Securities Act of 1933 and Sec. 10(b) and 15(c) of the Securities Exchange Act of 1934. The fraud count de-

pends upon diversity of citizenship which is not alleged and does not exist. Plaintiffs alleged that they are citizens of Illinois and do not allege any defendant's citizenship. This lack of a jurisdictional allegation is itself a ground for dismissal. However, the court also knows from the other pleadings and from the criminal proceedings against some of the defendants (Case No. 73 CR 679, N. D. Ill., E. Div.) that some of them are citizens of Illinois.

Count II alleges violation of various provisions of the federal Securities Acts, cited above. However, plaintiff Fry has not alleged the purchase or the existence of a "security" within the definition of *S.E.C.* v. *W. J. Howey Co.*, 328 U.S. 293, 298-9 (1946). Plaintiffs were merely customers of defendant for trading in commodities and were not engaged in a common enterprise with defendants or among themselves. Plaintiffs relied on defendants' expertise in anticipation of a profit and perhaps made the defendants their agents, but this does not result in an investment contract or a security. *Milnarik* v. *M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972).

With the Fry complaint disposed of, we turn to the one filed earliest, *Patterson et al.* v. *Stovall, et al.*, 73 C 2280. This complaint as amended on September 21, 1973 not only attempts to state a common law fraud in Count I and a Securities Act violation in Count II but also states a cause of action in Count III under Sec. 4 and 6b of the Commodities Exchange Act. 7 U.S.C. §§ 4, 6b.

Sec. 6b provides in pertinent part as follows:

> Unlawful practices—Members of contract markets.—It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market,

for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

The question of Federal jurisdiction is not free from doubt. Allegedly, defendants never made any actual purchases or sales on behalf of the plaintiff customers but diverted their funds to other uses. Furthermore the sale of a cash commodity for deferred delivery is not covered by the Act. Some of the defendants, however, were members of the Chicago Board of Trade which is a "contract

market" as defined in Sec. 7 of the Act. Thus they are subject to the general regulatory provisions of Sec. 6b and allegedly violated subsection (1) thereof.

Defendants have not contested our jurisdiction over this complaint, but of course the parties cannot confer jurisdiction upon the Federal court by agreement. We believe that Count III of Patterson's Amended Complaint probably states a Federal cause of action. A private suit lies for violation of Sec. 6b *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (N. D. Ill. 1967). Jurisdiction is found in 28 U.S.C. §1337. However, we are not fully enough advised on the facts or the law at this point to be sure of the jurisdiction question, since no party has actively contested it. Therefore attorneys for both sides should either satisfy themselves of the meaning and application of the Commodities Exchange Act or take a voluntary dismissal and proceed with the State court action of *Markham* v. *Stovall*, 73 CH 5282. Otherwise they may find after much expending of time and money that the Federal case cannot withstand an attack.

All of the other complaints except *Keppy, et al.* v. *Stovall, et al.*, 73 C 2385, purport to state a cause of action under the Commodities Exchange Act. *Churchill, et al* v. *Stovall, et al.*, 73 C 2468 is not a class action. The *Fry* and *Keppy* complaints will be dismissed for lack of Federal jurisdiction. The two class actions filed after *Patterson* (*Dobson* and *Brackett*) will be consolidated with *Patterson*. The attorneys in *Patterson* will be designated as lead counsel for the consolidated case, unless and until it appears that plaintiff or his attorneys have a conflict of interest with the class, as discussed hereinafter.

A proposed settlement agreement has been filed for court approval and objected to by Fry's counsel. The first objection concerns the amount set aside for payment of

claims. Although these objections have been on file for some time, no plaintiff has shown that defendants have concealed any assets or even that the fund held for payment of claims will not substantially satisfy them. This cannot be known until discovery is pursued and class members are notified of their rights. The theory and structure proposed in the settlement for disposing of defendants' assets to class members excludes a minimum of $1,000,000 for payment of claims by class members who opt-out, for I.R.S. claims, for any fine levied in the criminal case, for defendants' attorney fees, and for whatever other purposes the court sees fit. We believe this is a realistic way to marshall defendants' assets for the benefit of all creditors, at least until all class members have had an opportunity to file objections.

A more serious objection to the settlement is a provision which anticipates ultimate dismissal of all claims with prejudice, not only against the named defendants but also against "their subsidiaries, agents, officers, directors and employees and all principals, salesmen, dealers and agents'". This appear to be too broad, especially since it could embrace some potential plaintiffs who acted not only as investors on their own account but as solicitors or agents for the defendants. If they were in the latter category and participated in the defendants' alleged fraud, they should not be released from liability until they have been made defendants and have participated in the settlement. This Court has previously disapproved a proposal settlement in which defendants attempted to protect themselves from cross actions by non-settling defendants. *Schaefer, et al.,* v. *1st National Bank of Lincolnwood,* 69 C 364 (N.D. Ill., E. Div.). The foregoing provision in Stovall's proposed settlement smacks of the same deficiency and must be amended to apply only to the named defendants.

This leads to the question of a class determination, which, as the Supreme Court has recently made clear, should be made before the merits, including settlement, are decided. *Eisen* v. *Carlisle & Jacquelin,* ..... U.S. ....., 94 S. Ct. 2140 (1974). Fry's counsel alleges that some plaintiffs or their attorneys have a conflict of interest because of their dual status as investors and as potential defendants. This deficiency does not appear from the face of the *Patterson* complaint, but if such a conflict does in fact exist, we would not permit Patterson's counsel to continue as lead counsel in this case unless he or any other dealers withdraw as plaintiffs. Otherwise the named plaintiffs would not be a fair and adequate representative of the class. *Eovaldi, et al.* v. *First National Bank of Chicago,* 71 C 1654 (Decision dated 11-29-72).

The class alleged in *Patterson* is "all purchasers of cash commodities for deferred delivery . . . who purchased from the defendants." Apparently no statute of limitation problem exists, so no date is contained in the foregoing definition. The definition has been agreed to by the defendants, as evidenced by their proposed form of notice. We find and conclude that this definition of a class is satisfactory for purposes of a notice, and the objections of Fry's counsel thereto are overruled, subject to identification of a qualified plaintiff. If a potential defendant is a member of the plaintiff class, he is nonetheless entitled to notice and an opportunity to opt out. He may find himself a defendant or a counterdefendant or his claim may ultimately be disallowed on equitable or other grounds, but this does not constitute a defect in the class definition.

Defendants have filed a proposed notice. It appears to be substantially satisfactory if modified to conform to this decision. Some technical changes should be made, however; e. g. mailings to the clerk of this court must be

directed to a special Post Office box obtained for that purpose and no copies need be sent to the attorneys. Also par. 6 on page 7 should be deleted, leaving open the question of attorneys' fees. The cost of mailing will be borne by plaintiffs in accordance with *Eisen* v. *Carlisle & Jacqueline, supra.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Defendants' motion to dismiss the complaint in *Fry, et al.* v. *Stovall, et al.*, 73 C 2748 is granted;

2. The objections of Fry to the proposed settlement are overruled except as to paragraph 5 thereof;

3. The motion of plaintiffs in *John Patterson, etc.* v. *Stovall,* 73 C 2280 for class determination is granted in the form set forth above, and their Motion to Consolidate is granted, except for *Fry* v. *Stovall* and *Keppy* v. *Stovall,* 73 C 2385 which are dismissed, and *Churchill* v. *Stovall,* 73 C 2468 which is not a class action;

4. Defendants' Motion to Approve Settlement Agreement is granted, with the exception of the provision in paragraph 5 quoted hereinabove. (p. 6).

Counsel for defendants are directed to prepare and serve a modified settlement proposal and a modified class notice within ten (10) days hereof, and all of these cases will be called for a status report on Friday, July 26, 1974 at 10:00 a. m.

ENTER:

/s/ *Thomas R. McMillen*
Judge, U. S. District Court

Dated: July 12, 1974

EXHIBIT E

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY and JEANNETTE KEPPY, individually and as representative of a class,
Plaintiffs,

vs.

ROY STOVALL, et al.,
Defendants.

CIVIL ACTION NO. 73 C 2280
And Consolidated Cases 73 C 2382 and 73 C 2720

NOTICE OF CLASS ACTION AND SETTLEMENT HEARING

TO: All PERSONS WHO INVESTED IN CASH COMMODITIES FOR DEFERRED DELIVERY WITH ROY STOVALL, STOVALL AND STOVALL, AMERICAN CASH COMMODITIES OF MISSOURI INC., AND FRANK L. HACKBARTH

There are pending in this Court three separate actions (called Patterson Action) alleging violations of the law with respect to the use of funds invested in "cash commodities for deferred delivery" deposited with ROY STOVALL, STOVALL AND STOVALL, FRANK L. HACKBARTH and AMERICAN CASH COMMODITIES OF MISSOURI, INC., defendants (hereinafter called STOVALL, HACKBARTH and AMERICAN).

On July 12, 1974, the Court entered an Order determining that this action be maintained as a class action on be-

half of those persons who invested in cash commodities for deferred delivery with these defendants.

The Complaint and Amended Complaint in the Patterson Action charge the defendants with acts and omissions which are claimed to have violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Rules of the Securities and Exchange Commission, the Commodities Exchange Act, and the common law. In brief summary, these charges include the following:

The Complaints charge that the defendants defrauded plaintiffs-investors and depositors by manufacturing fictitious trades, not investing funds as represented, or trading adversely and against plaintiffs; that defendants' conduct constitutes common law fraud and deceit, and also violates the Securities and Exchange Acts of 1933 and 1934, the Rules promulgated thereunder, and the Commodities Exchange Act. Plaintiffs are claiming a refund of their investments, money damages, punitive damages, attorneys' fees and costs.

All defendants who have appeared and answered have denied the alleged violations and liability on account thereof and have raised certain defenses.

Defendant Continental Illinois Bank & Trust Company of Chicago is presently holding and investing the funds subject to Order of Court.

All documents referred to above, and any other documents filed in these cases, are available for inspection in the Office of the Clerk of the United States District Court, 20th Floor of the Everett McKinley Dirksen Building at 219 South Dearborn Street, Chicago, Illinois.

In order to avoid further expense involved in the litigation, the plaintiffs have agreed with defendants STOVALL,

HACKBARTH and AMERICAN to settle the Patterson Action.

1. *Purpose of Notice.* If you are a member of this Class, your rights may be affected by the Patterson Action and the settlement. This Notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either the plaintiffs or the defendants, but is given for the sole purpose of informing you of the pendency of the Patterson Action and of the proposed settlements so that you may make appropriate decisions as to what steps, if any, you may wish to take.

2. *The "Class".* The Class as defined by the Court consists of all persons, who invested in cash commodities for deferred delivery with the defendants, ROY STOVALL, STOVALL AND STOVALL, AMERICAN CASH COMMODITIES OF MISSOURI, INC., and FRANK L. HACKBARTH. If you so invested in cash commodities for deferred delivery with defendants you will be a member of the Class unless you take the steps provided in this Notice to exclude yourself.

3. *The Settlement with Defendants.* The defendants STOVALL, AMERICAN and HACKBARTH, have submitted a Settlement Agreement for approval to the Court. The Agreement provides, in substance, that $6,500,000 (now approximately $6,800,000) (Fund "A") will be set aside and deposited in interest-bearing accounts for eventual distribution to those Class members on a pro rata basis who establish their claims and to counsel for plaintiffs for their fees and expenses, as determined by the Court, in full and final settlement of all claims against STOVALL, AMERICAN and HACKBARTH, which are alleged in the Complaints or could have been alleged by reason of or in connection with any matter or fact set forth or referred to in any of the Complaints.

The approximate sum of $1,000,000 (Fund "B") will be set aside in interest-bearing accounts and subject to claims of any creditors who are not depositors, the claims of depositors who choose to litigate their claims, claims of the Internal Revenue Service, and of any creditors who are not depositors, defendants' attorneys' fees and costs and any fines imposed against defendants in the criminal proceedings before Judge Abraham L. Marovitz. In the event any funds remain in Fund "B" after payment of all claims herein described, the balance shall be turned over to AMERICAN.

In the event that the Settlement is approved and becomes effective, the Patterson Action, and all Related Actions will be dismissed on the merits and with prejudice and all Class members (other than those who elect to be excluded from the Class), will be barred and permanently enjoined from asserting against STOVALL, AMERICAN and HACKBARTH, any and all claims, demands or causes of action which are alleged by reason of or in connection with any matter or fact set forth or referred to in any of the Complaints.

The Court has tentatively approved the Settlement as fair, reasonable and adequate. The Revised Settlement Agreement is attached as Addendum "A".

Under the Agreement, no payments except for the cost of Notices to the Class, will be made until all of the conditions set forth in the Agreement have been satisfied, including that the Court finally approve the amount of fees, costs and disbursements for counsel for plaintiffs and the Class, and enter as to the defendants a final Judgment of Dismissal with prejudice against the plaintiffs and all members of the Class who have not timely excluded themselves.

NOW THEREFORE, TAKE FURTHER NOTICE:

1. If you are a member of the Class, you will be bound by any Judgments rendered in connection with this lawsuit and with these Settlements, unless, on or before September 23, 1974, you file a Written Election to be Excluded from the Class. Persons who request exclusion will not be entitled to share in the benefits of Settlement Fund "A". The Form for such written election is enclosed for your use if you wish to be excluded from the Class. The Form is Addendum "B". Your election to be excluded from the Class should be addressed to:

Clerk of United States District Court
P. O. Box 4323
Chicago, Illinois 60680

2. If you do not elect to be excluded from the Class, you may enter an appearance through your own counsel, if you desire, and participate through your counsel. Otherwise, your interest, if any, in this litigation as a member of the Class will be represented by counsel for plaintiffs, and you will be advised at a later date when and how claims should be filed.

3. A hearing will be held before this Court in Room 2103, 219 South Dearborn Street, Chicago, Illinois 60604, on October 3, 1974, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, for the purpose of determining whether the terms of the Settlement Agreement are fair, reasonable and adequate, whether the Settlement Agreement should be approved by the Court, and if approved, for the purpose of entering Judgment thereon in accordance with the Settlement Agreement. The hearing may be adjourned from time to time without further notice to the Class.

4. Any member of the Class who did not file a Written Request for Exclusion may appear at the hearing and show cause, if any he has, why the Settlement Agreement should not be approved as fair, reasonable and adequate, why Judgment thereon dismissing the Patterson Action and all Related Actions against defendants should not be entered; provided that such Class member who wishes to object must file a written objection with the Clerk of the Court at the United States District Court, Northern District of Illinois, Eastern Division, P. O. Box 4323, Chicago, Illinois 60680, not later than September 23, 1974. Any papers filed with the Court must bear the name of this action, "John Patterson, et al. v. Roy Stovall, et al," and the index number, "73 C 2280". The postmark on the envelope will determine whether any papers mailed to the Court for filing are timely.

5. No person shall be entitled in any way to contest the approval of the terms and conditions of the Settlement Agreement, or the Judgment entered thereon if approved, unless he has served and filed written objections in accordance with the preceding paragraph.

H. Stuart Cunningham
Clerk of the United States
District Court
Northern District of Illinois
Eastern Division

Dated: August 16, 1974

Chicago, Illinois

ADDENDUM "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION NO. 73 C 2280
And Consolidated Cases 73 C 2382 and 73 C 2720

JOHN PATTERSON, RAY KEPPY and JEANNETTE KEPPY, et al.,

Plaintiffs,

vs.

ROY STOVALL, et al.,

Defendants.

REVISED SETTLEMENT AGREEMENT

This settlement agreement as revised pursuant to Order of Court dated July 12, 1974, is submitted for the Court's consideration of its reasonableness and adequacy pursuant to Rule 23, F.R.C.P., and the procedures set forth in the Manual for Complex and Multidistrict Litigation, as revised. The terms and conditions contained herein constitute the settlement agreement between counsel for the undersigned defendants and counsel for all plaintiffs in these consolidated cases. This settlement agreement would resolve in a full and final settlement of all pending consolidated claims against the undersigned defendants brought on behalf of the plaintiff class.

TERMS OF AGREEMENT

1. The general purpose of this agreement is to effect a full and final settlement and release of all consolidated claims against the undersigned defendants, brought by or on behalf of all plaintiffs and arising out of, mentioned in, related to, or based in whole or in part on any of the facts or matters alleged in the actions as heretofore filed, or which may hereafter arise between all named plaintiffs, and defendants Rawlin L. Stovall, Stovall & Stovall, Inc., American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth. The consolidated cases are:

Case Title	*Case Number*
John Patterson vs. Roy Stovall, et al.	73 C 2280
Richard Dobson, et al. vs. Roy Stovall, et al.	73 C 2382
R. Glenn Brackett vs. Roy Stovall, et al.	73 C 2720
Arnold Mark, et al. vs. Roy Stovall, et al.	73 CH 5282

(Circuit Court of Cook County)

For purposes of carrying out the terms of this agreement, all counsel of record for plaintiffs in the consolidated class action shall constitute a Committee of Counsel for the consolidated class actions. The term "plaintiffs" shall include all depositors of funds with any named defendants, or depositors of funds with any unnamed principals, salesmen, brokers, independent contractors, dealers or agents, all for the purpose of investing in "cash commodities for deferred delivery" with any named defendants.

2. The undersigned defendants state that by this agreement they do not admit that they, or any of them, or any of their predecessors or present or former agents, officers, directors, or employees committed or participated in any

violations of any laws, or that they, or any of them, are liable to the plaintiffs, or anyone, for damages relating to the investments in cash commodities for deferred delivery. However, in order to avoid lengthy, costly and time-consuming litigation and in order to avoid the risks of litigation and to obtain total and final settlement of the claims alleged against them, the undersigned enter into this agreement subject to all the terms and conditions contained herein.

3 (a). As a result of efforts in the *Patterson* case, and of negotiations between counsel for all parties in the consolidated cases, there now exists the following funds of money, (i) on deposit in checking accounts, interest-bearing accounts, and securities at the Continental Illinois National Bank in the approximate amount of $7,800,000.00 and, (ii) except for funds released to the defendants by prior order of court, the defendants represent that there are no other funds which relate to the claims asserted in this cause and/or to the claims of any depositor.

All funds, increments, and interest accruing thereon, shall hereafter be referred to as the "Settlement Fund", and shall be divided into two parts upon the entry of an appropriate order by the District Court approving the settlement and designating the two funds. "Settlement Fund A" shall be in the approximate sum of $6,500,000.00 and "Settlement Fund B" shall be in the initial sum of $1,000,000.00, Upon execution hereof, and appoval by the District Court, all monies, funds, securities and items shall be converted to high yield, secure investment securities which shall be readily converted to cash and not subject to market fluctuations, all subject to court approval.

3 (b). "Settlement Fund A" shall consist of all of the aforesaid funds and all interest accruing thereon, less

$1,000,000.00 allocated to "Settlement Fund B". Upon its establishment by court order, "Settlement Fund A" shall be available to all plaintiff-depositors who shall participate in this settlement by filing acceptable claims for refund (which shall be limited to the amount of monies deposited, exclusive of interest, profits and other increments) with the Court, and for claimants who do not file, but may be equitably entitled to a refund; "Settlement Fund A" shall be used for the pro rata distribution of all such claims, subject only to actual costs of administering said funds which are necessarily incurred by consolidated class counsel, costs in mailing distribution after notice, and reasonable costs and attorneys' fees to consolidated class counsel.

Anything contained herein to the contrary notwithstanding, no plaintiff participating in "Settlement Fund A" shall receive an amount in excess of 100% of his deposit, less court awarded fees and costs. If any funds are remaining after payment of all plaintiffs' claims, those funds shall "pour over" and be added to "Settlement Fund B".

Claimants to "Settlement Fund A" shall be only those persons who have invested monies with any plaintiff or any defendant for the purpose of investing in cash commodities for deferred delivery with named defendants and who have not received a full return of their principal investment, except for those persons who have previously settled or released their claims.

3 (c). "Settlement Fund B" shall initially consist of $1,000,000.00 plus whatever sums "pour over" under Paragraph 3 (b). Interest accruing on said $1,000,000.00, after court approval establishing "Settlement Fund B", shall inure to that Fund. All money in "Settlement Fund B" shall be set aside and held subject to further order of Court, and shall be held subject to the disposition of such litigation as may ensue on behalf of "opt out" claimants or others, including defendants' attorney fees and costs. It shall also be subject to claims of the Internal Revenue Service. After payment or denial by court order of all of those claims, and the expiration of 30 days thereafter, all funds remaining, if any, shall belong to "American", but in no event shall this occur less than one year after approval of this settlement by the District Court, unless extended by Court order.

Any and all depositors' funds hereafter located and not specifically mentioned herein shall be included in "Settlement Fund A".

3 (d). Defendants "Stovall" and "American" represent as part of this Settlement that the net total sums paid by all plaintiffs to "Stovall" and "American" (after withdrawals) is no greater than $8,900,000.00; in the event the deposits of all plaintiff-class exceed $8,900,000.00, the defendants agree that the Court shall reduce "Settlement Fund B" by such amount and include said Funds in "Settlement Fund A;

4. All attorneys' fees to be awarded for plaintiffs' counsel in the consolidated cases shall be awarded and paid from "Settlement Fund A" created by this agreement, and all other costs and expenses of the administration of the settlement fund and notice to class members shall be paid from the "Settlement Fund A".

5. Following disposition of this agreement by the Court, the consolidated plaintiffs shall, subject to the court retaining jurisdiction to enforce the terms and conditions of this agreement, move to dismiss*, with prejudice, all claims

* and shall concurrently dismiss the case of *Arnold Mark, et al.* v. *Ray Stovall, et al.*, 73 CH 5282, Circuit Court of Cook County, Illinois.

heretofore described against the undersigned defendants, their subsidiaries, agents, officers, directors, and employees, except those persons who have previously exercised their option to be excluded from the plaintiff class as determined by the Court in this litigation.

6. This agreement shall be binding on the heirs, executors, administrators, successors, and assigns of the undersigned defendants and the Court shall retain continuing jurisdiction to enforce the terms and conditions of this settlement agreement.

7. This agreement represents the entire and sole agreement negotiated and agreed to between the consolidated plaintiffs and the undersigned defendants. The distribution of the proceeds of the Settlement Fund shall be according to such plan as the plaintiffs may propose and the Court shall approve. The undersigned agree that determination of an equitable plan of distribution is feasible only after the number and nature of the claimants are known.

It is agreed that all distributions shall be made by check or draft, the acceptance of which shall constitute a full release of all claims which the depositor-plaintiff may have against any defendant.

8. Upon the final approval of a plan of distribution, such plan shall be incorporated as part of this agreement and may be appended hereto as Schedule A.

9. The Settlement and compromise of all actions will be submitted to the Court for its approval under Rule 23 (e) of the Federal Rules of Civil Procedure. If so approved, all pending actions will be dismissed with prejudice as to all defendants. The Court will, however, retain jurisdiction for purposes of administering this Settlement.

Attorneys for Plaintiffs;

/s/ Philip S. Wolin

/s/ Arthur Mintz

/s/ Edward A. Berman

/s/ Michael A. Zelmar

/s/ Jeffrey Schulman

/s/Herbert Rothbart

/s/ Max Humphries

Defendants and Attorneys

/s/ Rawlin L. Stovall

RAWLIN L. STOVALL, Defendant

AMERICAN CASH COMMODITIES OF MISSOURI, INC., Defendant

By /s/ Rawlin L. Stovall

/s/ James Brandvik

/s/ Jacobson & Brandvik

FRANK L. HACKBARTH

By /s/ Wallace, Shelton, Kleinman & Kalcheim

/s/ Coleman Ginsparg

ADDENDUM "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION — NO. 73 C 2280
And Consolidated Cases 73 C2382 and 73 C 2720

JOHN PATTERSON, RAY KEPPY and JEANNETTE KEPPY, individually and as representative of a class,
Plaintiffs,

- vs -

ROY STOVALL, et al., *Defendants.*

ELECTION TO BE EXCLUDED FROM THE CLASS

The undersigned, a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall, a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, hereby elects to be excluded as a member of the class defined in the captioned action.

The undersigned understands that by executing this Election to be Excluded from the Class, the undersigned will neither be bound by nor participate in any settlements obtained or judgments rendered in the captioned matter, whether said settlements or judgments are favorable or adverse to the class.

Dated: ....., 1974

Please Print Below:

1. Your name or names: .....
2. Your address: .....

.....

Please sign your name or names below:

.....

Signature

EXHIBIT F

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge,
Honorable THOMAS R. MC MILLEN

Date: February 20, 1975

Cause No. 73 C 2280 & Consolidated Cases
73 C 2382 & 73 C 2720

Title of Cause — *Patterson* v. *Stovall*

Enter order that pending matters which are now under advisement are hereby acted upon by the following Findings & Conclusions: 1. The Revised Settlement Agreement, etc. This case will be called for a report on status on MONDAY, APRIL 7, 1975 at 10:00 a.m., subject to any motions that may be noticed by any party on or before that date. (DRAFT)

Enter Order Approving Settlement & Judgment, Notice of Filing Requirements for Participation in Settlement Fund, & Sworn Statement of Claim (3 DRAFTS)

/s/ *McMillen J.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY and JEANETTE KEPPY, individually and as representatives of a class,
Plaintiffs,

vs.

ROY STOVALL, et al.,
Defendants.

NO. 73 C 2280 & Consolidated Cases 73 C 2382 and 73 C 2720

ORDER

A number of motions and reports have been taken under advisement in the above-entitled cases, and the parties have filed their memoranda and otherwise stated their positions on the motions filed, up to and including February 3, 1975. The pending matters which are now under advisement are hereby acted upon by the following Findings and Conclusions:

1. The Revised Settlement Agreement signed by the parties on or about July 26, 1974 and filed herein is approved. The objections of James Fry and others which were filed in writing on September 23, 1974 and which have been stated in open court from time to time thereafter are overruled. Most of the specific objections have been obviated by prior rulings or will be covered by this Order. In addition, the court now finds and concludes that the division of the defendants' assets into Fund A and Fund B is a fair and reasonable settlement of this controversy, and that establishment of Fund B is necessary and desirable to provide a source of payment for claimants who have opted out of this case, for Roy Stovall's possible fines and tax liabilities, for his attorneys' fees and for other unforeseen contingencies. No part of Fund B will be released to him until final disposition of his criminal case by Judge Marovitz and will be subject to that judge's discretion.

2. The expense of litigating the five pending actions through trial and possible appeal could well consume more of the total funds than the approximately 20% by which the claims will be reduced by the settlement, and there is a distinct possibility that the defendants could prevail in those cases, either on the issue of Federal jurisdiction or on their claims for commissions or other fees and expenses.

3. The court is satisfied that the attorneys representing the class are fair and adequate advocates for their clients' position and that no collusion or undue influence was engaged in in negotiating the revised settlement with the defendants. There is no evidence to the contrary.

4. The Fry Objectors have filed four reports summarizing their progress in investigating the fairness of the settlement and their attempts to discover assets. To the extent that these reports contest the fairness and adequacy of the settlement, we have overruled them, above. These objectors have waived their opportunity to opt-out of the settlement (with the exception of some of the objectors who did opt-out and who therefore are no longer in this case), and the remaining objectors represent less than ½ of 1% of the claims. They have been given full opportunity to present their objections and will not be permitted to delay the settlement any further.

5. The Fry Objectors' Report No. 3 filed January 7, 1975 requests "instructions" in their attempt to discover

additional assets. The Court has advised the objectors that they are free to pursue their search for assets to the extent they believe this will be fruitful but that they will probably not be able to charge their services or costs against the fund unless additional assets are produced. The Court by now responding to the request for instructions specifically disclaims any intention to charge the objectors' fees or costs against the fund. It would appear, however, that Request No. 1, referring to $283,000 which is allegedly uncollected, was largely revealed in the J.K. Lasser & Co. report as set forth in Defendants' Response to Objectors' Report No. 2, filed January 6, 1975. "Further discovery" is not necessary for purposes of settlement. The $211,000 "not accounted for" by the J.K. Lasser & Co. report is likewise satisfactorily explained in defendants' said response, and a formal audit is not justified on the basis of the facts. The amounts allegedly deposited in banks in Grand Cayman Island and Bermuda do not justify taking off-shore depositions, but the court authorizes "contacting" these banks, either by the Fry Objectors or by the Continental Illinois National Bank and Trust Co. There is no objection to taking the depositions of Messrs. Rutherford or Yowell, presumably to determine if they should disgorge funds for the settlement fund.

6. The objection to a release of the defendant Frank L. Hackbarth is overruled. Mr. Hackbarth has filed an affidavit dated January 21, 1975 which states unequivocally that he has not received any proceeds or remuneration from the defendants, with the exception of a business transaction for computer services. Although Mr. Hackbarth has declined to testify on the grounds of the Fifth Amendment, no one has demonstrated why he should be required to contribute to the settlement fund, and we agree with the co-defendants that such a release is necessary to protect

them from claims for contribution in the event that judgments might subsequently be obtained against Mr. Hackbarth.

7. Plaintiffs have led an Order Approving Settlement and Final Judgment. They have also filed a Notice of Filing Requirement to Participate in Settlement Fund and a Sworn Statement of Claim. Objections and counterproposals to these documents have also been filed. The Order will be modified and entered this date. The Notice and Statement of Claim forms are likewise modified and attached to the Order. The court contemplates a partial distribution of funds shortly after the claims are processed.

8. The principle change in the proposed Order is the elimination of a determination pursuant to F.R.C.P. 54(b). We do not believe that this rule applies to the present circumstances, but any party may file a separate motion for that purpose if they see fit.

9. The other controversy involving the proposed Order concerns interest earned on the funds on deposit at the Continental Illinois National Bank and Trust Co. of Chicago. Upon examination of pars. 3(b) and 3(c) of the Revised Settlement Agreement, the court finds and concludes that Fund B will not earn interest until it has been separated from Fund A.

10. The Fry Objectors filed a motion on November 26, 1974 to require Rawlin L. Stovall, defendant, and Alfred H. Adelman of J.K. Lasser & Co. to answer certain questions which they have allegedly declined to answer at their depositions. This motion has been objected to by the defendants and also by certain of the plaintiffs. Since there is no reason to preclude full inquiry into the existence and location of any assets which should be subjected to the claims of the plaintiffs, the questions are ruled upon as follows:

(A) The objections to questions A2, A3, A7, A11, A14 and A15 propounded to Rawlin (Roy) Stovall on October 22, 1974 are overruled. The remaining objections are sustained.

(B) The objections to question B4 propounded to Rawlin Stovall on October 8, 1974 are overruled. The remaining objections are sustained.

(C) The objections to questions C3 and C4 of the Alfred Adelman deposition of October 18, 1974 are overruled. The remaining objections are sustained.

The court is aware that some of the foregoing questions seem to have been answered and that the parties may be able to so stipulate without reconvening the depositions. The foregoing ruling on objections is not to be construed as authorization for pursuing questions regarding assets unreasonably or unnecessarily.

This case will be called for a report on status on Monday, April 7, 1975 at 10:00 a.m., subject to any motions that may be noticed up by any party on or before that date.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: February 20, 1975

EXHIBIT G

Cornell Phillip 1/4 of 3500 of G

506
1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY AND JEANETTE KEPPY, individually and as representatives of a class,

Plaintiffs,

-vs-

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2280
and consolidated cases
73 C 2382
and
73 C 2720

Objector —

SWORN STATEMENT OF CLAIM

TO: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 3500.00 (Thirty Five hundred dollars)
on Jan. 2, 1973 - 3000.00 and June 16, 1973 - 500.00 (dates)
with defendants. The undersigned has received the following amounts from defendants: $ none
. The net amount now claimed is $ 3500.00 ✓.

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names Philip M. Corkill
Suzanne Corkill

2. Your address 3N 435 Wilson
Elmhurst, Illinois 60126

Philip M. Corkill Suzanne Corkill
Signature of the Claimant

Dated: 3/15, 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

Corkill, William & Jean

Objector - 50c

-72

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY AND JEANETTE KEPPY, individually and as representatives of a class,

Plaintiffs,

-vs-

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2280
and consolidated
cases
73 C 2382
and
73 C 2720

SWORN STATEMENT OF CLAIM

TO: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 2500.00

on September 20, 1972 ($1500.00), December 20, 1972 (1000.00) (dates)

with defendants. The undersigned has received the following amounts from defendants: $ NONE

. The net amount now claimed is $ 2500.00 ✓ .

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that William P. and Jean B. Corkill ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names William P. and Jean B. Corkill

2. Your address 430 Berkshire Street

Oak Park, Illinois 60302

William P. Corkill
Jean B. Corkill

Signature of the Claimant

Dated: 3-18-75, 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

3-18-75

Duda, Joanna
692
113 Objector's list

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY AND JEANETTE KEPPY, individually and as representatives of a class,

Plaintiffs,

-vs-

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2280
and consolidated cases
73 C 2382
and
73 C 2720

Signed in Apr 20

SWORN STATEMENT OF CLAIM

TO: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 1500.00

on February 20, 1973 (dates)

with defendants. The undersigned has received the following amounts from defendants: $ NONE

. The net amount now claimed is $ 1500.00 ✓ .

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that Joanna C. Duda ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names Joanna C. Duda

2. Your address 430 Berkshire Street

Oak Park, Illinois 60302

Signature of the Claimant

Dated: , 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

3-18-75

Fry James T (Objector) 837 1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
MAR 20 1975

JOHN PATTERSON, RAY KEPPY AND JEANETTE KEPPY, individually and as representatives of a class,

Plaintiffs,

-vs-

ROY STOVALL, et al.,

Defendants.

NO. 73 C 2280 and consolidated cases 73 C 2382 and 73 C 2720

...S P. CHAPMAN

SWORN STATEMENT OF CLAIM

TO: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 5575.00

on $3000.00 On 4-12-73 and $2575.00 On 7-20-73 (dates)

with defendants. The undersigned has received the following amounts from defendants: $ nothing

. The net amount now claimed is $ $5575.00 ✓ .

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names James T Fry

807 N Lombard Ave

Oak Park Illinois 60302

3-12-75 James T Fry
Signature of the Claimant

Dated: , 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

Jezierski, Diane L
objector 1288
472

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[illegible]s PATTERSON, RAY KEPPY AND JEANETTE [illegible]RY, individually and as representatives of a class, Plaintiffs, -vs- ROY STOVALL, et al., Defendants.	)	NO. 73 C 2280 and consolidated cases 73 C 2382 and 73 C 2720

RECEIVED
JAMES P. C[illegible]
Clerk's Office
JUL 25

SWORN STATEMENT OF CLAIM

To: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 5,000.00

on Sept. 12, 1972 ($2500.00) Nov. 7, 1972 ($2,500.00) (dates)

with defendants. The undersigned has received the following amounts from defendants: $ -0- _____. The net amount now claimed is $ $5,000.00 ✓.

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that _____ ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names DIANE L. JEZIERSKI

2. Your address 4441 SOUTH TRUMBULL AVE
CHICAGO ILLINOIS 60632

Diane L Jezierski
Signature of the Claimant

Dated: 3/14, 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

Ryan Robert 2273 -3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Objector

JOHN PATTERSON, RAY KEPPY AND JEANETTE KEPPY, individually and as representatives of a class, Plaintiffs, -vs- ROY STOVALL, et al., Defendants.	)	NO. 73 C 2280 and consolidated cases 73 C 2382 and 73 C 2720

cbk

SWORN STATEMENT OF CLAIM

TO: Clerk, United States District Court
Northern District of Illinois
Eastern Division
P. O. Box 4323
Chicago, Illinois 60680

The undersigned is a person who purchased cash commodities for deferred delivery from Rawlin L. Stovall a/k/a Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., or Frank L. Hackbarth, and has read and is familiar with the contents of the Notice dated August 16, 1974.

The undersigned wishes to received payment of his prorata distribution of Settlement Fund "A", and has not opted out of this case.

The undersigned invested a total of $ 5[illegible]

on (5000.00 on 1-29-73) (3500.00 on 3-19-75) (dates)

with defendants. The undersigned has received the following amounts from defendants: None

. The net amount now claimed is $ 5[illegible] ✓ .

You must attach documentary evidence of such purchase. Photocopies of the cancelled checks or other written evidence of payment must be attached, if obtainable. Your claim is subject to whatever verification may be required.

Under penalties of perjury, it is declared that the information contained above is true, correct and complete.

In participating in the settlement herein the undersigned will release the defendants herein in accordance with the following:

RELEASE

KNOW YE, that ("Releasor"), for valuable consideration, the receipt whereof is hereby acknowledged, by these presents does for himself, and his heirs, executors, administrators, successors and assigns, remise, release and forever discharge Roy Stovall, Stovall and Stovall, American Cash Commodities of Missouri, Inc., and Frank L. Hackbarth (Collectively the "Released Persons"), and their respective heirs, executors, administrators, successors and assigns, jointly and severally, of and from all manner of actions, causes of action, suits, debts, dues, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty or in equity, which against the Released Persons and their heirs, executors, administrators, successors and assigns, jointly or severally, Releasor ever had or now has or which his heirs, executors, administrators, successors or assigns can, shall or may have against the Released Persons or any of them and their respective heirs, executors, administrators, successors and assigns, jointly or severally for, upon or by reason of or in connection with any investment by Releasor with the "Released Persons" in connection with cash commodities for deferred delivery purchased from Defendants and any and all claims asserted or which might be asserted in any complaint in the actions pending respectively in the United States District Court, Northern District of Illinois, entitled Patterson vs. Stovall, 73 C 2280 and 73 C 2383 and 73 C 2720.

Please Print Below:

1. Your name or names Robert V Ryan

2. Your address [illegible]

[illegible]

[illegible]
Signature of the Claimant

Dated: [illegible], 1975

NOTE: Any person who knowingly submits a false claim shall be subject to all penalties provided by law.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN PATTERSON, RAY KEPPY and JEANETTE KEPPY, individually and as representatives of a class,
Plaintiffs,

vs.

ROY STOVALL, et al.,
Defendants.

NO. 73 C 2280 and Consolidated Cases 73 C 2382 and 73 C 2720

PETITION TO AUTHORIZE PAYMENT TO "OPT OUT" DEPOSITORS FROM "SETTLEMENT FUND B"

Now comes the Defendants, RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC., by their attorneys, JAMES A. BRANDVIK and LOWELL H. JACOBSON and pray for an order authorizing and directing a 70% payment to be made to certain "Opt Out" depositors from "Settlement Fund B", and as grounds therefore Defendants state as follows:

1. That a petition was heretofore filed by the Defendants requesting authorization to offer a settlement to the "Opt Out" depositors on the same basis as payment made to the depositors who have settled under "Settlement Fund A".

2. That this court authorized a sworn statement of claim and settlement offer to be presented to the eighteen

(18) "Opt Out" depositors offering a 70% payment at the present time and a balance to be determined at a later date, depending upon the amount paid to depositors participating in "Settlement Fund A".

3. That this sworn statement of claim and settlement offer was forwarded to the eighteen (18) "Opt Out" depositors and sworn statements of claim together with supporting documents have been filed on behalf of certain of these "Opt Out" depositors.

4. That the amounts of the claims are shown on the attached list together with a computation of 70% of said claim shown opposite the name of each claimant.

WHEREFORE, Defendants pray that an order be entered authorizing and directing the Continental Illinois National Bank to make payments equivalent to 70% of the deposits shown on the attached list of "Opt Out" claimants.

Rawlin L. Stovall and American
Cash Commodities Of Missouri, Inc.
By *James A. Brandvik*
James A. Brandvik and Lowell H.
Jacobson, their attorneys

Jacobson and Brandvik
10 South LaSalle Street
Chicago, Illinois 60603
782-8572

"OPT OUT" DEPOSITORS

NAME	AMOUNT CLAIMED	70%
Walter W. Labidee Chamberlain, S. D. 57325	$1,610.00	$1,127.00
Raymond S. & Juanita H. Olvera 1209 14th Street Moline, Illinois 61265	2,000.00	1,400.00
Lillian L. Hough 38 S. Cameron St. Winchester, Va. 22601	3,000.00	2,100.00
John W. Truitt Rt. 1 Laclede, Missouri 64651	550.00	385.00
Calude C. Mawyer Rt. 1, Box 6 C Keswick, Va. 22947	3,000.00	2,100.00
Viola M. Timko Lakefield, Minn. 56150	1,500.00	1,050.00
Alice P. & Earl A. Schmidt RR #1 Stockton, Iowa 52769	1,500.00	1,050.00
Earl A. & Alvin Schmidt RR #1 Stockton, Iowa 52769	6,000.00	4,200.00 (Paid from Fund "A") To be reimbursed to Fund "A"

NAME	AMOUNT CLAIMED	70%
Mrs. Faye L. Eaves Mtn. Falls Rt., Box 74A Winchester, Va. 22601	$1,500.00	$1,050.00
Kenneth Dusseau Chamberlain, S. Dakota	1,600.00	1,120.00
Fred A. Lodder Rt. #1 Salisbury, Mo. 65281	2,000.00	1,400.00
Steve Young 500 Vahigh Road West Des Moines, Iowa 50326	1,600.00	1,120.00
Jimmie L. Woods 441 First St. Pontiac, Michigan 48055	7,010.00	4,907.00
Dale & Ruth Carpenter 3565 Kenwood Ave. Memphis, Tenn. 38122	3,000.00	2,100.00

Supreme Court, U. S.
FILED
JUL 9 1979
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No. 78-1846

In the

Supreme Court of the United States

OCTOBER TERM, 1978

RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC.,

Petitioners,

vs.

JOHN PATTERSON, et al., WILLIAM P. CORKILL, et al., JAMES P. CHAPMAN, EDWARD T. JOYCE, MARTHA JENKINS, JAMES A. BRANDVIK, LOWELL H. JACOBSON, CRAIG E. ANDERSON, ROBERT E. CRONIN,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Appeals (Pet. App. 1-5 and 7-21) are reported in 490 F.2d 338 (7th Cir. 1979) and in 582 F.2d 180 (7th Cir. 1976).

Based upon the arguments stated below, respondents deem the earlier 1976 decision of the 7th Circuit the actual opinion below being appealed from in the petition for certiorari filed herein.

QUESTIONS PRESENTED

1. May petitioners seeking this Court's writ of certiorari from a second appeal of the case urge matters conclusively determined in a decision over three years ago?

2. Is an award of attorneys' fees to objectors' counsel in a class action, in the manner in which petitioners raise that issue, a matter of such consequence that the issue should be entertained by this Court?

STATEMENT

The petition for certiorari filed in this case on June 11, 1979 by the petitioners cannot be considered by this court, in the opinion of respondents, without simultaneously reviewing the petition for certiorari and the brief for the United States in opposition filed in *United States* v. *Stovall*, No. 78-1494. (See Pet. 4-6) The issues are intertwined to such an extent that the respondents herein adopt the brief of the United States as part of their argument herein. The statement of the case described therein is equally applicable here and incorporated herein.

ARGUMENT

1. A study of the petition for certiorari indicates that the real opinion below sought to be appealed at this late date is in fact the earlier case of *Patterson* v. *Stovall*, 582 F.2d 180, in which a rehearing was denied on January 26, 1976. In that case the petitioners herein filed a petition for rehearing in which their arguments made and rejected were practically identical to the present points advanced now three years later in their petition for certiorari. The headings of those arguments in the earlier *Stovall* case, without more, discloses the untimeliness of the petition. These are:

I. The parties never contemplated and the written settlement agreement never provided that Judge Marovitz in the Criminal case would have the right in the Civil case to order restitution to all depositors under the terms of Fund B.

II. This court's opinion enlarges the authority of Judge Marovitz to make restitution under Title 18 U.S.C. Section 3651 without any review of the full record of the criminal case, without any argument or citations or authority and without any participation by the government in the proceedings.

III. Any court found ambiguity regarding restitution not raised by the parties must be resolved in favor of the criminal defendant or the plea in the criminal case may be withdrawn.

IV. This court's opinion changing the settlement between parties has the effect of eliminating all of the consideration for the settlement which might otherwise have gone to the defendants.

2. The only point which was not the subject of the earlier decision in 1976 is Point III of the questions presented, referring to an award of attorneys' fees to objectors' attorneys. Pet. 17-19) The first two questions presented are:

> I. Whether the Court of Appeals exceeded its jurisdiction when it found that the Appellants had standing to pursue the appeals before the Court in the face of a settlement of the claims of the Appellants on or before the date the Notice of Appeal was filed;
>
> II. Whether the Court of Appeals exceeded its jurisdiction when it rendered an opinion on the effect of a settlement agreement in the civil case before it on the sentence to be imposed by a judgment in a criminal case; (Pet. 6)

are both fully disposed of by the earlier 1976 *Stovall* opinion.

The current petition for certiorari as to Points I and II has not been filed in conformity with Supreme Court Rule 13(1) requiring the petitioner to docket the appeal within 90 days of the entry of a judgment appealed from.

3. Not one of the considerations suggested by this court in Rule 19.1.(b) governing acceptance of review on certiorari is present here.

There is no conflict cited with any decision of another court of appeals on the same matter; there are no important questions of law set forth which could be settled by this court's review of this matter; there are no federal questions which conflict with applicable decisions of this court; there is no showing that the award of attorneys' fees is a substantial departure from the usual course of judicial proceedings; nor is any fact alleged calling for the exercise of this court's supervisory powers.

CONCLUSION

This case is simply not one which merits this Court's review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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